Guthrie Landscaping Sdn Bhd v Hasrat Usaha Sdn Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO D2–22–1974 OF 2008
MARY LIM JC
30 SEPTEMBER 2010

Civil Procedure — Trial — Submission of no case to answer — Claim for monies due on subcontract works — Whether witnesses called by defence to defend claim or prove counterclaim — Whether plaintiff's claim premature — Whether defendant only obliged to pay plaintiff if it received monies from main contractor — Whether plaintiff's work unsatisfactory or amount claimed incorrect — Whether conduct of parties showed time not of essence — Work completion dates pleaded in defence and counterclaim differed from plaintiff's testimony — Whether there was objection from defendant to delayed completion — Whether notice of intention given to claim liquidated damages — Delay partly caused by interference from defendant's other subcontractors

The plaintiff claimed against the defendant for the balance of monies owing on two subcontract works. The defendant disputed the claim on the ground the plaintiff's work was defective or unsatisfactory and also alleged that there was delay in completion by reason of which it counterclaimed for liquidated and ascertained damages ('LAD'). The defendant also alleged the plaintiff's claim was premature as there was a 'back-to-back' arrangement between the parties where the defendant's obligation to pay the plaintiff only arose if it itself received payments from the main contractor, which only came a month after the plaintiff's claim was filed. The defendant chose not to call any witnesses, even to prove its counterclaim, and submitted no case to answer at the close of the plaintiff's case.

Held, allowing the claim with costs and dismissing the counterclaim:

(1) The plaintiff's claim was not premature and the submission of no case to answer premised on that ground failed. The term 'back-to-back' was nothing more than a loose arrangement between the parties. From the evidence disclosed, all that was required from the plaintiff for payment to be made was simply a submission of its progress claim (see para 13).

(2) For the defendant's argument to be valid, the 'back-to-back' arrangement had to be understood and executed by the parties stringently and precisely throughout the contract. But the arrangement was understood and practised differently. The defendant's payments were never against the progress claims presented by the plaintiff and were not as and when

and what was paid by the main contractor to the defendant. The defendant simply made payments to the plaintiff as well as to its other subcontractors (see para 11).

(3) The defendant's allegation of unsatisfactory work on the plaintiff's part was a matter of defence. On a 'no case' submission the court was not concerned about the defendant's case but whether the plaintiff had established its case. In any event, there was no evidence of any complaints from the defendant on defective or unsatisfactory work and the argument that this was the reason payment was not made to the plaintiff could not be accepted (see paras 14 & 15).

(4) The defendant never disputed the plaintiff's final claims and statements of accounts submitted to them. The amounts stated in the statements therefore had to be considered correct. Neither was any dispute raised to the letter of demand sent to the defendant. As such the plaintiff had proved the amount claimed (see para 17).

(5) The defendant contended that its claim for delay in completion of the works had been proved by the evidence of the plaintiff's witness PW1 who testified that both contracts were only completed in May 2004. But the defendant's pleadings stated that one project was completed on 15 November 2003 and the other on 10 April 2004 (see paras 19 & 22).

(6) A special damage claim had to be specifically proved. Though a party may rely on any evidence already before the court towards proof of its claim, the right to the claim depended fundamentally on the pleaded case. Here, the completion dates, which were critical to the calculation of liquidated damages, were different from that pleaded. That alone lent doubt to the defendant's claim (see para 22).

(7) The parties did not adhere strictly to the various dates set out in the subcontracts. By allowing the plaintiff to complete at a time other than that agreed, and even instructing it to do so, without giving notice of intention that liquidated and ascertained damages ('LAD') would be claimed, the defendant had waived its right to LAD and disentitled itself to that claim (see paras 26 & 28).

(8) Item 4 in Appendix 1 of each subcontract between the parties specifically stated that LAD was claimable for 'non-completion'. But the subcontracts were completed though at dates other than originally agreed. As such the imposition of LAD did not arise and the claim on this ground failed (see para 32).

[Bahasa Malaysia summary

Plaintif menuntut terhadap defendan untuk wang baki yang kena bayar atas dua kerja subkontrak. Defendan mempertikaikan tuntutan atas alasan bahawa kerja plaintif adalah cacat atau tidak memuaskan dan juga mendakwa bahawa

terdapat kelewatan dalam menyiapkan atas alasan yang mana ia menuntut balas untuk ganti rugi jumlah wang tertentu dan ditentukan. Defendan juga berhujah bahawa tuntutan plaintif adalah pramasa kerana terdapat penyusunan 'back-to-back' di antara pihak-pihak di mana tanggungjawab defendan untuk plaintif hanya berbangkit jika ianya menerima pembayaran daripada kontraktor utama, yang dapat diperolehi sebulan selepas tuntutan plaintif difailkan. Defendan memilih untuk tidak memanggil mana-mana saksi walaupun untuk membuktikan tuntutan balasnya dan berhujah bahawa tiada kes untuk dijawab pada akhir kes plaintif.

Diputuskan, membenarkan tuntutan dengan kos dan menolak tuntuan balas:

(1) Tuntutan plaintif bukan pramasa dan penghujahan bahawa tiada kes untuk dijawab berdasarkan alasan tersebut adalah gagal. Terma 'back-to-back' hanyalah penyusunan longgar di antara pihak-pihak. Daripada keterangan yang dikemukakan, kesemua yang diperlukan daripada plaintif untuk pembayaran dibuat hanya penyerahan tuntutan kemajuannya (lihat perenggan 13).

(2) Untuk hujahan defendan menjadi sah, penyusunan 'back-to-back' patut difahamkan dan dilaksanakan oleh pihak-pihak secara ketat dan tepat sepanjang kontrak tersebut. Tetapi penyusunan difahamkan dan diamalkan secara berlainan. Pembayaran defendan tidak pernah terhadap tuntutan kemajuan yang diserahkan oleh plaintif dan bukan sebagaimana dan apabila yang dibayar oleh kontraktor utama kepada defendan. Defendan hanya membuat bayaran kepada plaintif dan juga kepada subkontraktor-subkontraktornya yang lain (lihat perenggan 11).

(3) Tuduhan defendan terhadap kerja yang tidak memuaskan oleh pihak plaintif adalah perkara pembelaan. Atas penghujahan 'no case' mahkamah mengambilkira mengenai kes defendan tetapi sama ada plaintif telah membuktikan kesnya. Walau bagaimanapun, tidak terdapat keterangan mengenai apa-apa aduan daripada defendan atas kerja cacat dan tidak memuaskan dan hujahan bahawa ini adalah sebab mengapa bayaran tidak dibuat kepada plaintif tidak boleh diterima (lihat perenggan 14 & 15).

(4) Defendan tidak pernah mempertikaian tuntutan akhir plaintif dan penyata akaun yang diserahkan kepada mereka. Jumlah yang dinyatakan di dalam penyata-penyata tersebut oleh itu perlu dipertimbangkan sebagai betul. Juga tiada pertikaian dibangkitkan terhadap surat tuntutan yang dihantar kepada defendan. Oleh itu plaintif telah membuktikan jumlah yang dituntut (lihat perenggan 17).

(5) Defendan berhujah bahawa tuntutannya untuk kelewatan dalam menyiapkan kerja-kerja telah dibuktikan oleh keterangan saksi plaintif PW1 yang memberi keterangan bahawa kedua-dua kontrak hanya siap

pada Mei 2004. Tetapi pliding defendan menyatakan bahawa satu projek telah siap pada 15 November 2003 dan lagi satu pada 10 April 2004 (lihat perenggan 19 & 22).

(6) Tuntutan ganti rugi khas patut dibuktikan secara khusus. Walaupun sesuatu pihak mungkin bergantung atas apa-apa keterangan yang ada di hadapan mahkamah ke arah bukti tuntutannya, hak untuk menuntut bergantung secara asasnya atas kes yang diplid. Dalam kes ini, tarikh-tarikh siap, yang mana adalah kritikal kepada perkiraan ganti rugi jumlah wang tertentu, adalah berbeza daripada apa yang diplidkan. Dengan hanya ini saja akan memberikan keraguan kepada tuntutan defendan (lihat perenggan 22).

(7) Pihak-pihak tidak mematuhi secara ketat kepada beberapa tarikh yang ditetapkan di dalam subkontrak tersebut. Dengan membenarkan plaintif menyiapkan pada masa lain selain daripada masa yang dipersetujui, dan walaupun mengarah ia berbuat demikian, tanpa memberi notis niat bahawa ganti rugi jumlah wang tertentu dan ditentukan akan dituntut, defendan telah mengetepikan haknya kepada ganti rugi jumlah wang tertentu dan ditentukan dan telah membuatkan ianya tidak berhak kepada tuntutan tersebut (lihat perenggan 26 & 28).

(8) Perkara 4 dalam lampiran 1 setiap subkontrak di antara pihak-pihak secara khas menyatakan bahawa ganti rugi jumlah wang tertentu dan ditentukan boleh dituntut untuk 'non-completion'. Tetapi subkontrak-subkontrak telah siap tetapi pada tarikh-tarikh lain dari tarikh yang telah dipersetujui pada asalnya. Oleh itu pengenaan ganti rugi jumlah wang tertentu dan ditentukan tidak berbangkit dan tuntutan atas alasan ini adalah gagal (lihat perenggan 32).]

Notes

For a case on submission of no case to answer, see 2(3) *Mallal's Digest* (4th Ed, 2010 Reissue) para 8866

Cases referred to

Dodd v Churton [1897] 1 QB 562 (refd)

Herrington v British Railways Board [1972] AC 877, HL (refd)

Jaafar bin Shaari & Anor (suing as administrators of the Estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor [1997] 3 MLJ 693; [1997] 4 CLJ 509, SC (refd)

Leolaris (M) Sdn Bhd v Bumiputra-Commerce Bank Berhad [2009] 1 LNS 901, HC (refd)

Shen Yuan Pai v Dato Wee Hood Teck & Ors [1976] 1 MLJ 16; [1974] 1 LNS 152, HC (refd)

Sim Chio Huat v Wang Ted Fui [1983] 1 MLJ 151; [1983] CLJ 363, FC (refd)

Subry bin Hamid v Husaini bin Tan Sri lkhwan & Anor [2006] 6 MLJ 229; [2006] 4 CLJ 50, CA (refd)
Takako Sakao (f) v Ng Pek Yuen (f) & Anor [2009] 6 MLJ 751; [2010] 1 CLJ 381, FC (refd)
Trollope & Coils Ltd v North West Metropolitan Regional Hospital Board [1973] 2 All ER 260, HL (refd)
Yoong Sze Fatt v Pengkalan Securities Sdn Bhd [2010] 1 CLJ 484, CA (refd)

Legislation referred to

Contracts Act 1950 s 56, 56(3)

Wan Shahrizal Wan Ladin (Wan Shahrizal, Hari & Co) for the plaintiff.
C Soosay Nathan (Mohamed Fakhzan with him) (Christie Soosay Nathan & Associates) for the defendant.

Mary Lim JC:

BACKGROUND FACTS

[1] In the federal government's development of the new administrative centre of Putrajaya and then linking it to capital city of Kuala Lumpur, so much and so many were involved. The corporation tasked with that development was Putrajaya Holdings Sdn Bhd (PJH). PJH entered into arrangements with different contractors for the numerous jobs that needed to be done. Those contractors in turn had subcontractors, again for different aspects of the works involved; and the list goes on. Amongst those contractors was the defendant who, by way of two agreements both dated 12 November 2001, was awarded two projects relating to the proposed construction and completion of the light rail transit (LRT) infrastructure works Sourthern and Central Boulevard packages at precincts 3 and 4 of the Putrajaya Core Island Development Packages LRT–BLVD 103 and 104.

[2] Through separate but similarly worded letters of acceptances dated 19 February 2002, the defendant appointed the plaintiff as the nominated subcontractor for the execution and completion of the supply, delivery, planting and maintenance of softscape for Packages LRT – BLVD 103 and 104. Again, separate but similar formal subcontracts were subsequently made between the parties on 12 November 2002 (subcontracts). The plaintiff's work entailed maintenance works, maintenance of planted areas: trees, shrubs, climbers, herbaceous and groundcover; maintenance of law areas; replacement planting before final handover to the defendant. The total value for both subcontracts was RM5,096,656.60.

[3] Both subcontracts had the same commencement date, that is 14 January 2002 but their completion dates differed. Package LRT–BLVD 103 was

expected to be completed by 1 March 2003 while Package LRT–BLVD 104 was expected to be completed by 8 February 2003. The plaintiff completed both projects but beyond these dates and was not paid in full. The plaintiff's claim of RM410,000 is for the balance due for both subcontracts. Actually, as at August 2008, the total amount due was RM410,061.78 comprising RM256,278.51 for LRT–BLVD 103 and RM153,783.27 for LRT–BLVD 104. But, the plaintiff decided to round-up its claim to RM410,000.

[4] In its defence, the defendant, inter alia, alleged that the claim was misconceived in law and in fact because the payment to the plaintiff was subject to the issuance of final certificates. These certificates will only be issued when the defendant was satisfied with the plaintiffs work. Because the defendant was not satisfied with the plaintiff's work, those works were not 'duly certified'. No payment was therefore said to be due. The defendant also claimed that there was delay in completion of the works. By reason of such delay, the defendant counterclaimed a sum of RM509,667.60 representing total liquidated and ascertained damages (LAD). The counterclaim is intended to set-off the plaintiff's claim.

[5] The plaintiff called two witnesses, both of whom were cross-examined by Mr Soosay Nathan, learned counsel for the defendant. At the close of the plaintiff's case, Mr Soosay Nathan submitted that there was no case for the defendant to answer and when put to election, elected not to adduce any evidence in defence to the claim. He further informed the court that the defendant would not be adducing any evidence to prove its counterclaim. It was the defendant's view that the evidence adduced by the plaintiff had failed to prove its claim while at the same time, there was sufficient evidence before the court to establish the defendant's counterclaim. Insofar as the plaintiff's claim was concerned, the defendant alleged that the plaintiff had pleaded that the parties had agreed that payment to the plaintiff was on a back-to-back understanding. This means the defendant was obliged to pay the plaintiff only after it had received payment from PJH. It is the failure to pay over upon receipt of such payment from PJH that a cause of action can be said to have arisen against the defendant. According to Mr Soosay Nathan, when the present proceedings were instituted on 4 November 2008, the defendant had not received any payment from PJH. The defendant only received payments from PJH on 4 December 2008, a month after this claim was filed. On this alone, the plaintiff's cause of action was therefore clearly premature and must be dismissed. The defendant further submitted that both witnesses called by the plaintiff gave no useful testimony as they were said to be unable to explain the details in the accounts produced.

PREMATURE CLAIM

[6] In response to the issue of whether the claim is premature, Encik Wan

Shahrizal, learned counsel for the plaintiff submitted that this was not relevant for consideration as the defendant had never pleaded the same in its defence. The defendant had also never raised this in any of its correspondence or dealings with the plaintiff. Alternatively, learned counsel submitted that the understanding and interpretation now suggested by the defendant is incorrect given that the plaintiff, through the testimony of Rosli bin Abdullah ('PW1'), its project manager, was never in a position to know if the defendant had received payment from PJH. The plaintiff was never informed by the defendant of such payments. Further, the payment arrangements throughout the operation of the two projects was not in the manner suggested by the defendant. According to Saiful Izhar bin Kamaruddin (PW2) who was familiar with the accounts and settlements by the defendant, the defendant made payments from time to time. Such payments were never for the amounts as appearing in the progress claims submitted by the plaintiff. The defendant simply made payments without any regard to the term 'back-to-back'.

[7] Dealing first with whether the issue may be raised in the manner proposed by the defendant, that the plaintiff's own case has not been proved by reason of its own pleadings. In my view, the answer is in the affirmative. In a no case submission, all the defendant is saying at this point is that by its own pleadings, the plaintiff's claim is premised on a back-to-back understanding. That simply means the plaintiff does not get paid until the defendant is paid by PJH. And since the evidence adduced shows payment from PJH was not received until after the writ was filed, the claim is premature and not sustainable and; a no case submission is properly made by the defendant.

[8] As a matter of strategy, no doubt this approach is entirely one for the defendant to consider and adopt. In fact, Lord Diplock in *Herrington v British Railways Board* [1972] AC 877 remarked that a no case submission '... is a legitimate tactical move under our adversarial system of litigation. But a defendant who adopts it cannot complain if the court draws from the facts which have been disclosed all reasonable inferences as to what are the facts which the defendant has chosen to withhold'. With respect, this is precisely the case here. The defendant's proposition in the circumstances of this case, is in my view a rather narrow one, seen through microscopic lenses, drawing too fine a line such that the overall picture and the full pleadings and facts are missed or not fully appreciated. There must be proper regard as to how the back-to-back arrangement stands in relation to the rest of the claim, how it was understood and executed by the parties throughout the duration of the subcontracts; and how it has since become one of the bases of the plaint. As always, I shall start with the pleadings.

[9] Paragraph 4.03 of the statement of claim pleads that the arrangement for payments for the subcontracts is on a back-to-back understanding:

'Pembayaran akan dibuat oleh defendan kepada plaintif secara 'back to back' selepas defendan menerima pembayaran dari pelanggan'. Then, from paras 5 onwards, the plaintiff sets out the circumstances of the execution and performance under the subcontracts. At para 8, the defendant is said to have agreed to promptly issue the final certificate upon completion of the works by the plaintiff in order to procure payment from PJH which can then be paid to the plaintiff. At para 9 of the statement of claim, the plaintiff alleges that to date, the defendant has failed to issue the final certificate for the works completed by the plaintiff three years ago. As of 5 June 2008, the statement of accounts show an outstanding sum of RM410,000 which has yet to be settled by the defendant in respect of both subcontracts. Despite repeated demands and in breach of the terms of the subcontracts, the defendant has refused, failed or negligent in the issuance of the final certificates and the settlement of the outstanding sums owed to the plaintiff. All that the defendants say to these paragraphs, in particular para 4.03 is to deny that there is delay on the part of the defendant; claim defective or unsatisfactory work and, allege delay in completion of both subcontracts which then forms the basis for the counterclaim.

[10] The back-to-back arrangement that the parties referred to is found in cl 7 in the letters of acceptance for both LRT-BLVD 103 and LRT – BLVD 104. Both clauses are similar and read as follow:

> It has been agreed that all drawings, specifications or any other documents, which are under the Main Contract pertaining to the Sub-Contract Works and have not been included under this Sub-Contract Agreement shall be deemed binding with the exception of clauses contained herewith in the Letter of Award, all other conditions shall be on a 'back-to-back' basis to the terms and conditions between Hasrat Usaha Sdn Bhd and the Employer.

[11] For the defendant's argument to be valid, it is my view that the back-to-back arrangement that the defendant talks about must be one understood and executed by the parties stringently and precisely throughout the progress of the works under the two projects. That is to say, in the absence of any dissatisfaction on the part of the defendant over the plaintiff's work, the defendant submits the plaintiff's progress claims to PJH and then pays precisely the amount stipulated in the progress claim after receiving the same from PJH. I must pause here to add that the term 'Employer' refers to PJH and that is not in dispute. However, from the testimonies of PW1 and PW2 as well as the documentary evidence, there is ample evidence to show that the back-to-back arrangement was understood and practised in quite a different way by the parties. The defendant's payments were never against the progress claims presented by the plaintiff and certainly were not as and when and what was paid by PJH to the defendant. As indicated earlier, the defendant simply

made payments to the plaintiff as well as to its other subcontractors. Why it did so in the manner that it did, one would never know as the defendant did not step forward to testify.

[12] So, it is to the evidence of the plaintiff's witnesses and the silent documentary evidence that the court will examine and draw conclusions as to what the parties meant when it used the term 'back-to-back'. From the accounts submitted, it is evident that the amounts paid by the defendant do not appear to have any bearing or co-relation to the progress claims. For example, in the statement of account for LRT-BLVD 103, it can be seen that the plaintiff had submitted four progress claims of varying amounts between 30 July 2003 and 30 December 2003. Between 30 January 2004 and 30 May 2004, the defendant made five payments. Aside from there being five payments in respect of four claims, none of the payments were for the amounts stated in the progress claims. Similarly, for the period from 28 February 2005 to 31 March 2006. After progress claim No 5 for RM164,087.33 was made, there were four other payments. The total of these four payments exceed the amount claimed in progress claim No 5. I observe similar entries in respect of LRT-BLVD 104. The sum effect of all these claims and payments together with adjustments by reason of revision and release of retention sum as reported in the statement of accounts for both projects was that a sum of RM153,783.27 was outstanding for the account under LRT-BLVD 103 and, RM256,278.51 as outstanding for the account under LRT-BLVD 104. Looking at the payments from PJH, it appears that the defendant had submitted claims beyond five progress claims for its own payment from PJH. Presumably the defendant's claims were based not only on the plaintiff's claims but also on those of its other subcontractors. But, whether the payments to the plaintiff were necessarily upon payments from PJH for the plaintiff's claims is unclear. The plaintiff would not be in the position to explain this. Only the defendant can. But it opted not to call any witnesses.

[13] Under the circumstances, I can only conclude that from the defendant's conduct to date and as revealed by its previous payments, the term 'back-to-back' was nothing more than a loose arrangement. From the evidence adduced, the term 'back-to-back' as used and understood by the parties in this case is quite peculiar. It is that understanding as proved by such evidence that the issue of whether the claim is indeed premature must be determined. And not, with respect, as suggested by learned counsel for the defendant. From the evidence disclosed, all that was required from the plaintiff before payment would be made was simply a submission of its progress claim. I do not therefore agree that the claim is premature and the no case submission premised on this narrow ground must necessarily fail.

UNSATISFACTORY WORK

[14] In this regard, I must express my concern as to whether it was open to

the defendant in the first place to raise the issue of unsatisfactory work as this is really a matter of defence. In a no case submission, I have expressed before in *Leolaris (M) Sdn Bhd v Bumiputra-Commerce Bank Berhad* [2009] 1 CLJ LNS 901 that at this stage, the court is not concerned about the defendant's case. The court's concern is whether the plaintiff has established its case such that the burden of proof now shifts to the defendant. Nevertheless, for the sake of completeness, this is my finding on this question.

[15] It was suggested that payment was not made because the defendant was dissatisfied with the plaintiff's work. With respect, I also cannot accept this argument. First of all, there is no evidence of any complaints from the defendant on defective or unsatisfactory work. On the contrary, the plaintiffs witnesses have testified that there was never any complaint from the defendant regarding the quality of its work. Instead, there is evidence of the plaintiffs alerting the defendant to the effect or impact of other subcontractors' work on its work; that such work may in turn cause delay to its work. In the absence of any contrary evidence or explanation, I must accept this part of the plaintiff's evidence as true and reliable — *Jaafar bin Shaari & Anor (suing as administrators of the Estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor* [1997] 3 MLJ 693; [1997] 4 CLJ 509;*Subry bin Hamid v Husaini bin Tan Sri lkhwan & Anor* [2006] 6 MLJ 229; [2006] 4 CLJ 50;*Yoong Sze Fatt v Pengkalan Securities Sdn Bhd* [2010] 1 CLJ 484; *Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751; [2010] 1 CLJ 381.

[16] Next, PW1 gave evidence that the plaintiff completed both projects sometime in 2004 and presented its final claims for payment around March 2005. Until November 2008 when this action was filed, the plaintiff had not received any payment. The defendant on the other hand received payment from PJH a month later. From this sequence of events and again for want of any oral or documentary evidence to the contrary, it can reasonably be inferred that that payment from PJH must have been consequent upon a final certificate issued by the defendant. Logically, that certificate must have been issued after the defendant was itself satisfied with the plaintiff's work. Hence, the contention of unsatisfactory work is not sustainable. I am therefore satisfied that the plaintiff's claim has been proved on a balance of probabilities.

QUANTUM

[17] On this issue of quantum, the plaintiff has explained that it had rounded up its claim from RM410,061.78 to RM410,000. Here, the plaintiff relies on the final claims and statement of accounts prepared. These final claims both dated 16 March 2005 have been acknowledged by the defendant's representative, one Encik Wan Nashrul without any reservations. According to PW2, these statements have been duly sent to the defendant. In these

statements, there are clear notices or reminders that 'if no remark is made within ten days, account will be considered as correct'. In other words, any discrepancies or disputes on the details in the statements must be raised within ten days from receipt of the statements. The defendant has never disputed in which case the sums stated in the statements must be considered as correct. The defendant further never disputed when the letter of demand was sent to them.

[18] On the facts, I am therefore compelled to agree with the plaintiff that this is more of an afterthought. I am thus satisfied that the plaintiff has proved the amount as claimed in the statement of claim.

COUNTERCLAIM

[19] This counterclaim is somewhat unusual as the defendant contends that this claim is proved from the evidence of PW1. It claims that it need not adduce any evidence, particularly oral testimony. The counterclaim is premised on an alleged delay. It was the submission of Mr Soosay Nathan that PW1 had testified that both projects were only completed in May 2004, long past the agreed dates. This meant that there was a delay of 427 days in the case of subcontract LRT-BLVD 103 which was supposed to have been completed on 1 March 2003; and a delay of 446 days in the case of LRT–BLVD 104 which should have been completed on 8 February 2003. The defendant's claim for LAD was now just a matter of calculation according to the formula set out in the subcontracts. The formula is located at similar item 4 in appendix 1 of each of the subcontracts and it reads:

LRT-BLVD 103

4 Liquidated and Ascertained Damages for non completion (Clause 50.1):

Overall Works RM79,500.00 per calendar day (With a maximum of 10% of the Contract Sum)

LRT-BLVD 104

4 Liquidated and Ascertained Damages for non completion (Clause 50.1)

iii) Overall works: RM82,000.00 per calendar day (with a maximum of 10% of the Contract Sum)

[20] The claim for LAD is calculated on overall works but, in both cases, the claim is limited to the maximum amounts of 10% of the subcontract sum. In the case of LRT-BLVD 103, the LAD was calculated at the rate of RM79,500 per calendar day for a delay of 427 days.

This would give a sum of RM33,946,500. Since this sum exceeds the subcontract sum of RM717,776, only RM71,777.60 was claimed. Similarly, for subcontract LRT-BLVD 104, LAD was calculated at the rate of RM82,000 per calendar day for 446 days giving a total sum of RM36,572,000. Again, due to the imposition of a maximum of 10% of the contract sum, only a sum of RM437,890 which is 10% of the contract sum of RM4,378,900 was claimed.

[21] The argument here is whether a claim and that includes a counterclaim, can be proved without witnesses being called and whether the evidence adduced by the plaintiff may be relied on by the defendant to prove its case. In this, I would have thought the answer is rather obvious. Evidence comprises oral and written testimony and in the case of the latter, the authenticity and contents of any written evidence may be agreed between parties. Once so agreed, the calling of witnesses is dispensed with. And this is what has transpired here. The bundle of documents relied on by the parties were part A type where both their authenticities and contents were agreed and thereby admitted in evidence. But, that once again, is not the end of the matter as the pleadings will need to be addressed.

[22] In this respect, the defence and counterclaim filed is insightful. According to para 3(i), LRT-BLVD 103 which was due for completion on 1 March 2003 was only completed on 15 November 2003. As for LRT- BLVD 104 which was due for completion on 8 February 2003, it was only completed on 10 April 2004 (see para 3(b) of the defence). This differs from the evidence of PW1. It is settled law that a special damage claim has to be specifically proved. No doubt the parties may rely on any evidence already before the court towards proof of its claim, the right to the claim nevertheless, must depend fundamentally on the pleaded case. Here, the date of completion which is critical to the calculation is different from that pleaded. That alone lends doubt to the defendant's claim.

[23] The matter of completion at a date other than that originally agreed is not in dispute. The plaintiff however contended that the dates stipulated in the subcontracts were not hard and fast dates as illustrated by the non-adherence to the time-lines set. In other words, time was not the essence of the contract that will entitle the defendant to the claim for LAD. Before proceeding further, I need to point out that both counsel submitted on the assumption that time is of the essence of this contract, that the defendant has a right to impose LAD in the event of delayed completion. Unfortunately, a complete copy of each of the subcontracts was not made available. Only pages relevant to the parties' arguments were compiled into the agreed bundle of documents. Presumably, this was because the subcontracts were voluminous. From the progress of the

trial and from the submissions, I believe the parties were not even aware of the state of the documents.

[24] Be that as it may and in relation to the issue of time being of the essence of the subcontracts, both counsel quite happily submitted, seeming to rely on their respective assumptions without objections from the other. I can only surmise that this was because the contract in question must be a fairly standard contract with provisions for time to be of the essence and that LAD may be imposed if there is delay but subject to notice being given. In other words, the general law on these two matters is to apply. On that understanding, I shall now proceed to deal with the issue.

[25] In this, the law too is fairly well-settled with high authority on the interpretation of s 56 of the Contracts Act 1950. Where time is of the essence of the contract and there is performance at a date other than that contracted, s 56 (3) of the Contracts Act 1950 as held by the Federal Court in *Sim Cho Huat v Wong Ted Fui* [1983] 1 MLJ 151; [1983] CLJ 363 is clear. At the material time of accepting performance at a time other than that agreed, the defendant as claimant or the 'innocent party' must give notice of its intention to claim LAD.

[26] In the application of this principle to the facts here, and having looked at the various dates, I must agree with the observations of the plaintiff that the parties themselves did not strictly adhere to the dates set in the subcontracts. To start with, the award of these subcontracts vide letter dated 19 February 2002 was way after the date of commencement of the subcontracts on 14 January 2002. The subcontracts were also only signed on 12 November 2002. Then, more telling is the defendant's letter dated 20 April 2004, where the defendant itself directed the plaintiff to continue with works outside the completion date of 8 February 2003, that is, to complete on or before 26 April 2004. This is what the defendant's senior project manager, Mr Ng Eng Kwoi said in his letter to the plaintiff:

> With reference to the above, we hereby instructed you to proceed with the turfing works at inter/outer ring and inside the Dataran Gemilang area immediately after received of this letter.
>
> Please be reminded that all the above works shall be completed on or before 26th April 2004 as a matter of urgency for handing over this project to PJH.
>
> Your immediate action and cooperation to the above is much appreciated.

[27] Nowhere is it mentioned in this letter that in accepting performance at a time other than the original agreed date, the plaintiff is notified of the defendant's intention to claim LAD. Neither did the defendant indicate in the

final claim when approving that final claim that it was making a claim for LAD. This, arguably, may have been considered as a notice of an intention to claim LAD when accepting performance at a date later than that agreed. However, the part of the final claim specifically set aside for such a claim to be made was left conspicuously blank by the defendant. In such conditions, the requirements under s 56(3) of the Contracts Act 1950 are not fulfilled so as to entitle the defendant to LAD.

[28] In *Sim Cho Huat* at p 153(MLJ); p 366(CLJ), the Federal Court observed that '... by allowing the delivery dates to pass and by acquiescing in the work continuing under the agreement and indeed by ordering extra work to be done for each of these houses, for which the agreement made no provision, the appellant must be held to have waived his right to treat himself as discharged therefrom. He must be deemed to have elected the agreement as still continuing'. Similarly, by allowing the plaintiff to complete at a time other than the agreed date, in fact by instructing the plaintiff to continue with the performance and complete at a later date without any mention of the imposition of LAD, the defendant must be treated as having waived its right to LAD and disentitling itself to that claim.

[29] In addition, this right to LAD would appear to be dependent on whether time was also regarded to be of the essence of the main contract and the imposition of LAD by PJH in the first place. There is no evidence of a notice or an imposition of LAD by PJH. Instead, PJH extended time for compliance by the defendant without imposing LAD.

[30] It was further contended by the plaintiff that the delay was occasioned by the defendant or its other subcontractors. PW1 testified that being landscaping work and being part of the overall contract works that the defendant as principal contractor was responsible for, it was important that the work schedules involving the defendant's other subcontractors did not interfere or disrupt the plaintiff's work. PW1 testified that unfortunately, its work was interrupted and he informed the defendant by letter sent in response to the defendant's letter of 20 April 2004 to the following effect:

> The above matter and your letter 20th April 2004 (Received 23rd April 2004) is referred.
>
> As per instruction by HUSB, GLSB will proceed the above mentioned work and complete it at latest by a week times. Unfortunately, as per our inspection, we found out that the irrigation system (sub-soil drainage) at the above-mentioned area is relatively not efficient or rather incomplete works.
>
> Please be reminded that in doing so, GLSB will not bound to carry the responsible and to take the risk to any repair works on damaged turfing in future caused by the sub-soil drainage failure.

A We hope HUSB will resolve this problem and your immediate action on this matter is highly appreciated.

[31] In *Trollope & Coils Limited v North West Metropolitan Regional Hospital* B *Board* [1973] 2 All ER 260, the House of Lords when dealing with the issue of the consequences or impact of delay in one phase on another phase where the work was to be carried out contemporaneously, examined *Dodd v Churton* [1897] 1 QB 562 as being 'well settled that in building contracts — and in other contracts too — when there is a stipulation for work to be done in a C limited time, if one party by his conduct — it may be quite legitimate conduct, such as ordering extra work — renders it impossible or impracticable for the other party to do his work within the stipulated time, then the one whose conduct caused the trouble can no longer insist upon strict adherence to the time stated. He cannot claim any penalties or liquidated damages for D non-completion in that time'. In *Shen Yuan Pai v Dato Wee Hood Teck & Ors* [1976] 1 MLJ 16; [1974] 1 LNS 152, BTH Lee J similarly applied the principle that a defendant should not be allowed to profit from his own omission where there is ample evidence to show that the delay was occasioned by the defendant's own default and that such failure led to delay in the progress E of the works. As I understand it, even with this disruption from other subcontractors' work and the delay in handing over of the project sites, the plaintiff nevertheless completed this subcontract by May 2004 though the defence pleaded that it was completed by 10 April 2004.

F **[32]** Finally, I observe that the imposition of LAD is by virtue of cl 50.1 of the subcontract. Because of the incompleteness of the documents, it is uncertain how cl 50.1 operates. As it stands, item 4 in appendix 1 of each subcontract specifically indicates that the LAD is where there is 'non-completion'. I can only understand 'non-completion' to mean precisely G that, non-completion. In the facts of this case, the subcontracts were completed, though at dates other than the dates originally agreed. To me, this means this imposition of LAD does not arise at all and the claim must necessarily fail.

H **[33]** With all the discrepancies and in view of the totality of the evidence and for the reasons already discussed; it is my judgment that the evidence before the court falls far short for the defendant to rely on as proving its counterclaim.

I **[34]** In view of my above findings, the plaintiffs claim is allowed and the defendant's counterclaim is dismissed. I further order that the plaintiff be paid

RM10,000 as costs. This was proposed by both learned counsel having regard to the complexity of the case, the time taken for trial and the standing of counsel in the legal practice.

Claim allowed with costs and counterclaim dismissed.

Reported by Ashok Kumar